Citations

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 69-5

D. H. OVERMYER CO., INC., OF OHIO

and

D. H. OVERMYER CO., INC., OF KENTUCKY,
Petitioners

v.

FRICK COMPANY, A PENNSYLVANIA CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
LUCAS COUNTY, OHIO

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the Common Pleas Court (A. 20), the decision of the Court of Appeals of Lucas County (A. 21-22) affirming the judgment of the Common Pleas Court, and the order of the Supreme Court of Ohio (A. 24) dismissing petitioners' appeal, are not reported.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3). The order of the Supreme Court of Ohio was entered December 17, 1969. The Petition for a Writ of Certiorari was filed April 16, 1970, pursuant to order of Mr. Justice Potter Stewart enlarging time to that date, and was granted March 29, 1971.

STATUTES INVOLVED

The relevant provisions of the Ohio Revised Code regulating confessions of judgment are set forth in the Appendix, *infra,* pp. 19-20.

QUESTIONS PRESENTED

1. Whether petitioners were deprived of property without due process of law by a confession of judgment pursuant to Ohio procedure, when

(a) the business enterprise which includes the petitioner corporations, with the assistance and advice of counsel, knowingly, intelligently, and voluntarily, in a typewritten contract negotiated specifically for this transaction, waived the right to notice and to a hearing prior to the entry of judgment, without purporting to waive any other rights (such as the right to move to vacate the judgment and the right to appeal); and

(b) the consideration for petitioners' waiver of notice and pre-judgment hearing included respondent's release of existing liens against petitioners' property; and

(c) petitioners obtained an extensive hearing subsequent to judgment in which the validity of their defense was considered and adjudicated.

2. Whether the federal question now urged was timely raised in the state courts.

STATEMENT

The petitioner corporations are two parts of a warehousing enterprise described in the record by one of its counsel as having "in three years built 180 warehouses in thirty states" (A. 30) and which in this matter acted through various corporations.[1]

Since the identity of specific Overmyer corporations is not relevant to the federal constitutional issues, the entire enterprise (including petitioners and affiliated corporations) is referred to herein as "Overmyer."

1. Overmyer defaulted in payment to Frick under the original construction subcontract.

The transactions resulting in the judgment against Overmyer commenced with a subcontract between respondent Frick Company ("Frick") and an Overmyer affiliate corporation, guaranteed by another Overmyer corporation, for the installation by Frick

[1] The construction subcontract was between Frick Company and Nixon Construction Company, a wholly owned subsidiary of Green & White Construction Company, Inc. (A. 44). Payment to Frick was guaranteed by D. H. Overmyer Warehouse Company. The stock of Green & white Construction Company, Inc. was purchased in January 1967 by D. H. Overmyer Co., Inc., (A. 44), not otherwise identified in the record. The first installment note was executed by The Overmyer Company, Inc., a New York corporation (A. 51). The second installment note was executed by the two petitioners, D. H. Overmyer Co., Inc., an Ohio corporation, and D. H. Overmyer Co., Inc., a Kentucky corporation (A. 7).

of refrigeration equipment in a warehouse under construction in Toledo, Ohio. Overmyer repeatedly failed to make progress payments to Frick (A.33-34, 45-48) and to other subcontractors (A. 44). In early October 1966, Frick discontinued work because of Overmyer's default, but stated a willingness to accept $35,000 in cash then offered by Overmyer "provided the balance can be evidenced by interest-bearing judgment notes" (A. 49). On November 3, 1966, Frick filed three mechanic's liens against the Toledo warehouse property in the total amount of $194,031.00, the balance due to Frick from Overmyer.

2. The first installment note provided for extended payments and retained Frick's mechanic's liens.

Three months later, in January 1967, Overmyer obtained Frick's agreement to reschedule the defaulted payments and finish the work if 10 percent of the past-due balance ($19,403.10) were paid in cash and the remainder paid in 12 equal monthly installments with interest at 6½ percent. Overmyer accordingly executed the first installment note, delivered February 7, 1967 (A. 53), requiring monthly payments of $15,498.23.

The first note (A. 51-52) contained no confession of judgment clause. In the text of the note Overmyer expressly recognized that the "mechanics lien[s]" would continue "in full force" except that Frick would forego enforcement of its lien rights "so long as there is no default under this Note" (A. 52).

Frick completed the installation and, after a demonstration of the machinery and equipment, Overmyer formally "accepted" the work "as per the contract conditions" (A. 54).

3. Overmyer requested a second extension of payments after Frick's work had been formally accepted.

Subsequent to Overmyer's acceptance of the completed installation, Overmyer requested both a further extension of time in which to make payment and a release by Frick of the mechanic's liens against the Toledo warehouse (A. 38-39). Discussions between Overmyer and Frick resulted in an agreement that Overmyer would execute the second installment note (the note on which judgment was taken) in the amount of $130,977, requiring payment of the outstanding amounts due Frick in 21 monthly installments ending March 1969, instead of 12 installments ending February 1968, as provided in the first note, thus reducing Overmyer's monthly payments from the $15,498.23 required by the first note to $6,891.85. The second note also reduced the rate of interest on the indebtedness from 6½% to 6%.

4. Frick released its mechanic's liens in consideration of the confession of judgment clause in the second installment note.

The understanding between the parties, pursuant to which the second installment note was delivered (A. 59-60), and the text of the second note itself (A. 6-7) required Frick to release its mechanic's liens against the Toledo warehouse. Instead of the mechanic's lien security, Frick obtained (a) the confession of judgment clause (which had not been included in the first installment note) and (b) two second mortgages on Overmyer properties in Tampa and Louisville.

Although the understanding reached between the presidents of the two organizations was confirmed by

letter dated June 23, 1967 from Overmyer's general counsel to Frick's counsel (A. 59-60), the executed original of the second installment note, a short, typewritten document (A. 6-7), was not delivered until three-months later on October 2, 1967. Delivery was made by letter signed by general counsel for Overmyer (Edmund M. Connery, Esquire, of counsel for petitioners in this Court).[2] Frick released the three mechanic's liens on November 3, 1967 (A. 39).

5. Overmyer sued unsuccessfully in New York to prevent entry of judgment following its intentional default under the second note.

On June 1, 1968, Overmyer intentionally defaulted in making payment of the installment due under the second note (A. 76), and contemporaneously commenced an action against Frick in the United States District Court for the Southern District of New York, seeking to enjoin the entry of judgment under the second installment note on the ground that Frick had breached the original subcontract (A. 61-79). Overmyer presented no evidence except a conclusory affidavit made by its New York trial counsel (A. 74-76). An *ex parte* stay order against Frick was vacated (A. 70-72, 78-79) and Overmyer's motion for an injunction was subsequently denied (A. 81-83). The District Court concluded:

> "Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary, the extensive documentary evidence furnished by defendant [Frick] indicates that the plaintiffs'

[2] The note and Mr. Connery's transmittal letter are typed in the same typeface, apparently on the same typewriter.

[Overmyer's] action lacks merit." (A. 83) (per Mansfield, J.)

6. The judgment against Overmyer in Ohio was followed by hearing and adjudication of Overmyer's defenses.

Subsequent to the order in New York vacating the *ex parte* stay order, Frick on July 12, 1968, entered judgment against Overmyer in the Common Pleas Court of Lucas County, Ohio, the county in which the Toledo warehouse is located, in the amount of $62,370.00 with interest and costs. Notice of the judgment was mailed to Overmyer at five locations by the Clerk, pursuant to Ohio statute (A. 1-2, 10).

On July 22, 1968, Overmyer filed motions to stay execution (A. 2, 30) and for a new trial (A. 2, 11). Both parties submitted affidavits and a hearing was held in the Common Pleas Court on August 15, at which time the opinion of the United States District Court was read into the record (A. 28) and Overmyer was granted time to file "whatever you want" (A. 29). On August 6, 1968, Overmyer filed a motion to vacate the judgment (A. 2, 13) and tendered an answer and counterclaim (A. 2, 13-19). A second hearing was held September 5, 1968 (A. 30).

No issue of federal or state constitutional due process was raised in the Common Pleas Court. Overmyer urged instead that "partial failure of consideration" was a defense to the note (A. 79). Frick urged that the consideration for the second installment note (on which the judgment had been taken) consisted of (a) the release of the three existing mechanic's liens, (b) the extension of time to 21 months from

12 months for payment of the debt due, (c) the reduction to 6 percent of the 6½ percent rate of interest in the first installment note (A. 38-42), all of which had been fully performed by Frick, and that any claims which Overmyer might assert arising from the original construction subcontract could not, as a matter of Ohio contract law, constitute a valid defense to Overmyer's obligations under the second installment note. Frick further contended that Overmyer's alleged claims under the original subcontract were barred both by Overmyer's acceptance (A. 54) and by the warranty limitations in the subcontract (A. 43).

By order entered November 16, 1968 the Common Pleas Court "on the record, supporting memoranda, affidavits, exhibits, and arguments of counsel" (A. 20) held that Overmyer's various motions were "not well taken" and overruled each motion.

Overmyer appealed to the Court of Appeals for Lucas County, Ohio, and for the first time attempted to raise a federal constitutional issue of denial of due process, stated in its "Assignment of Error, No. 2" to consist of the purported denial of "an opportunity to present a defense to a judgment on a cognovit note when such judgment is taken without notice and where a valid defense is asserted in an answer tendered with a motion to vacate the judgment filed within term" (A. 21). The Court of Appeals held, on the basis of the entire record, including "the Affidavits and Exhibits presented in the Common Pleas Court," that the lower court had, "with no abuse of discretion, properly overruled the defendant-appellant's motion to vacate the judgment" (A. 22).

Overmyer then appealed to the Supreme Court of Ohio, and argued, among other issues, that:

> "It is a violation of the right of trial by jury provided by Section 5, Article I, of the Ohio Constitution and of the right to due process of law provided by the Fourteenth Amendment to the United States Constitution for a trial court to deny a jury trial to the maker of a note who tenders a validly stated defense against the original holder thereof who has taken a judgment on a warrant of attorney when the trial court refuses to take evidence on the merits of the defense before deciding whether to vacate the judgment" (A. 23).

The Supreme Court dismissed the appeal and the petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

A. Overmyer's waiver of the rights to notice and hearing is effective because done voluntarily and intelligently with awareness of the likely consequences. *Brady* v. *United States*, 397 U.S. 742. Uncertainty as to future events does not vitiate an otherwise intelligent waiver. *Ibid.* Having induced Frick to release mechanic's liens in consideration for the second instalment note containing the confession of judgment clause, Overmyer is estopped to challenge the validity of the judgment taken on the note. *Shepard* v. *Barron*, 194 U. S. 553.

B. Recent decisions support the right of a party to a contract to waive notice, *National Equipment*

Rental, Ltd. v. *Szukhent,* 375 U.S. 311, and to waive a hearing otherwise required by due process. *Boddie* v. *Connecticut,* 401 U.S. 371. A contrary result in this case involving corporate property rights would be wholly inconsistent with decisions giving effect to waivers in cases involving personal liberty.

C. Petitioners' failure to raise any constitutional issue in the Common Pleas Court appears to deprive this Court of jurisdiction to review the judgment below, since Ohio requires that such issues be presented to the trial court. Ohio does not recognize uncertainty in the law as an excuse for non-compliance, even if such an uncertainty had been present in the instant case.

ARGUMENT

A. The record establishes a voluntary and knowing waiver of Overmyer's rights to notice and hearing.

Since no issue of denial of due process was raised by Overmyer in the Common Pleas Court, Frick had no occasion to present evidence directed specifically to the issue of Overmyer's waiver of those due process rights. The affidavits and documents now in the record (A. 31-78) were introduced to persuade the Ohio court, as similar materials had earlier persuaded the District Court in New York, that Overmyer's defenses were not meritorious.

Nonetheless, the instant record does show an effective waiver by Overmyer of its rights to notice and to a hearing, consistent with the strict standard applied by this Court to test the validity of waivers in criminal prosecutions, as recently restated in *Brady* v. *United States,* 397 U.S. 742, 748:

> "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

Each part of that standard is satisfied in the instant case.

Overmyer's waiver was wholly voluntary. The transaction effected by the second installment note conferred substantial benefits on Overmyer with no apparent benefit to Frick. This is not a case of a contract of adhesion. Frick did not refuse to deal with Overmyer unless Overmyer agreed to execute a confession clause. To the contrary, the first installment note contained no such provision. Measured by the holdings of *Brady*, 397 U.S. at 755 (guilty plea not invalid for lack of voluntariness merely because entered to avoid possibility of death penalty), or *North Carolina* v. *Alford*, 400 U.S. 25 (guilty plea voluntary despite protestation of innocence), there can be no reasonable doubt of the voluntariness of Overmyer's waiver affecting only corporate property rights.

The record equally establishes that Overmyer's waiver was knowing, intelligent, and done with sufficient awareness of the consequences. Overmyer does not contend that its general counsel did not understand the consequences of his delivery of the judgment note to Frick. Instead, Overmyer appears to argue that no waiver is valid at the inception of a transaction because future events may not be foreseen (Brief for Petitioners pp. 24-25). This argument may have weight as to many consumer transactions in which notes are signed before home repairs are commenced or retail merchandise delivered, but hardly

applies to the instant case in which the second note was delivered six months after Frick's work had been formally accepted by Overmyer.

Even if certain events could not have been predicted by Overmyer at the time of delivery of the note, such uncertainty does not vitiate the waiver. Decisions of this Court have consistently upheld the waiver of substantial rights, notwithstanding proof that such waiver was based on an erroneous prediction of future events. The waiver which results from a guilty plea is "intelligently made" even if based "on a faulty premise." *Brady* v. *United States,* 397 U.S. 742, 757 (guilty plea entered to avoid death penalty is effective notwithstanding subsequent declaration of unconstitutionality of death penalty section of Federal Kidnapping Act); *McMann* v. *Richardson,* 397 U.S. 759, 772-73 (guilty plea based on New York procedure respecting jury determination of voluntariness of coerced confession is effective notwithstanding subsequent declaration of unconstitutionality of that procedure).

Overmyer's conduct in persuading Frick to release the three mechanic's liens in consideration of the confession of judgment clause also brings this case within the rule that constitutional rights, intended for the protection of property, may be lost by estoppel as well as by express waiver. *Shepard* v. *Barron,* 194 U.S. 553, 568-69. The record shows that Frick reasonably desired security for the indebtedness owed by Overmyer and that Frick regarded the confession of judgment provision as equivalent, for these purposes, to the mechanic's liens. Having obtained Frick's consent to the exchange, Overmyer "upon general principles of justice and equity"

should not be allowed to claim that the action "taken upon the faith of [its] request, should be held invalid. . . ." *Shepard* v. *Barron,* 194 U.S. at 568 (assessment under "void" statute enforced against landowners who obtained improvement to their properties).

B. The due process rights of notice and hearing are subject to waiver by a corporation.

The rights to notice and hearing created by the Fourteenth Amendment language that no person shall be deprived of property without due process of law are rights subject to waiver. Both *Swarb* v. *Lennox,* 314 F. Supp. 1091 (E.D. Pa. 1970), and *Osmond* v. *Spence,* 327 F. Supp. 1349 (D. Del. 1971), despite records showing the difficulty in consumer transactions of establishing valid waiver, held nonetheless that a waiver could be effective even as to individuals signing printed form contracts in consumer transactions. The court stated in *Swarb* v. *Lennox,* in language relevant to the involvement of general counsel for Overmyer in the instant case:

> "Where the debtor is an attorney, all that may be necessary to prove that he understood the meaning and consequences of such a clause in a consumer financing note is an affidavit of such a debtor's profession." 314 F. Supp. at 1100-01.

The Court in *Osmond* v. *Spence* referred to "the settled proposition that an individual can, under specified conditions, waive a constitutional right such as notice and hearing. . . ." 327 F. Supp. at 1358. (Footnote omitted.)

Even without consent, this Court has upheld procedures which are similar in many respects to a limited power to confess judgment. Summary action to control prices in time of war, "subject to later judicial review of its validity," was upheld in *Yakus* v. *United States,* 321 U.S. 414, 442, as "justified by compelling public interest. . . ."

Immediate collection of taxes by summary administrative proceedings has been upheld on the ground that "where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips* v. *Commissioner,* 283 U.S. 589, 597. Similar procedures resulting in the creation of a lien on all property of the defendant as the result of state administrative action were sustained on the ground that the state procedure allowed "a reasonable opportunity to be heard and to present the defense" by the filing of an affidavit, *Coffin Bros. & Co.* v. *Bennett,* 277 U.S. 29, 31 (assessment against stockholders of closed bank).

Seizure and expenditure of the assets of an individual, without actual or constructive notice, upon his wife's affidavit that he is an absconding husband, has been sustained an an "ancient" procedure. *Corn Exchange Bank* v. *Coler,* 280 U.S. 218, 222.

In each of the foregoing cases some public interest was involved. However, in *Ownbey* v. *Morgan,* 256 U.S. 94, 112, "certain rather harsh legislation of the State of Delaware," *Corn Exchange Bank* v. *Coler,* 280 U.S. at 223, providing that a defendant in an action of foreign attachment could not assert his defenses without entering security "was sustained be-

cause of the origin and antiquity of the provisions," 280 U.S. at 223, in a case in which the defendant was unable to obtain security. In *McKay* v. *McInnes,* 279 U.S. 820, validity of foreign attachment without bond or affidavit was affirmed without opinion, a holding recently cited for the proposition that a "procedural rule that may satisfy due process for attachments in general, see *McKay* v. *McInnes,* 279 U.S. 820, does not necessarily satisfy procedural due process in every case." *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 340 (different rule required for attachment of wages). Unlike the wages involved in the *Sniadach* case, the property involved in the instant case deserves no greater protection than required "for attachments in general."

On the basis of these authorities, the State of Ohio would appear to be free, either for some public purpose or to protect private litigants, as in foreign attachment, to adopt a procedure which would allow the creation of a lien against Overmyer's property without Overmyer's consent and impose significant burdens upon Overmyer in a post-judgment hearing to determine Overmyer's defenses. But the instant case is, of course, one in which Overmyer, voluntarily and intelligently, did all that was necessary voluntarily to waive its due process rights, if those rights are subject to waiver. Petitioners contend that this case involves two specific due process rights, (a) the right to notice, and (b) the right to a hearing prior to judgment.

In recent decisions this Court has considered as settled the right of an individual to waive either or both of these rights.

In *National Equipment Rental, Ltd.* v. *Szukhent,* 375 U.S. 311, 315-16, the rule was stated to be "settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or *even to waive notice altogether,*" (emphasis added), citing among other authorities *Bowles* v. *J. J. Schmitt & Co.,* 170 F. 2d 617 (2d Cir. 1948). In that case the Court of Appeals (Augustus N. Hand, Clark and Frank, Circuit Judges) upheld a judgment confessed without notice in a District Court, despite lack of any statutory basis therefor, when the confessed judgment had been entered in an amicable injunction proceeding commenced against the same defendant.

In another recent decision, *Boddie* v. *Connecticut,* 401 U.S. 371, 378, the Court stated unequivocally that "the hearing required by due process is subject to waiver. . . ." 401 U.S. at 378-379.

Any holding that the property rights involved in the instant case are not subject to a voluntary and intelligent waiver would create an anomalous contrast to numerous holdings involving personal liberty. *E.g., Illinois* v. *Allen,* 397 U.S. 337, 342-43 (waiver by conduct of right to be present at criminal trial); *Miranda* v. *Arizona,* 384 U.S. 436, 444 (recognizing power to waive right to counsel and right against self incrimination); *Fay* v. *Noia,* 372 U.S. 391, 439 (waiver of habeas corpus); and *Rogers* v. *United States,* 340 U.S. 367, 372-73 (waiver by conduct of right against self incrimination).

C. No federal question was timely raised in the state courts.

Petitioners admittedly failed to raise any federal constitutional question in the Common Pleas Court,

notwithstanding ample opportunity. Since the Supreme Court of Ohio refuses to consider constitutional issues which are not raised in the trial court, this Court would appear to lack jurisdiction to review the judgment below. *Cardinale* v. *Louisiana,* 394 U.S. 437, 439; *Beck* v. *Washington,* 369 U.S. 541, 550.

The Supreme Court of Ohio strictly applies the rule that "one who complains of error must give the trial court a chance to avoid error by calling the court's attention to any alleged error." *State* v. *Lynn,* 5 Ohio St. 2d 106, 108, 214 N.E. 2d 226, 229-30 (1966). "It is fundamental that one cannot sit idly by while an error is committed by the trial court and then later complain of that error. To so hold would promote useless litigation that could have been promptly cut short by a correct ruling in the trial court." 5 Ohio St. 2d at 108, 214 N.E. 2d at 230. Ohio follows *Ansbro* v. *United States,* 159 U.S. 695, 698, holding that "an assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below. . . ." Nor does Ohio recognize uncertainty in the law as a valid excuse for non-compliance. *City of Toledo* v. *Reasonover,* 5 Ohio St. 2d 22, 213 N.E. 2d 179 (1965). In the *Reasonover* case a failure to object to the prosecutor's comment on a criminal defendant's failure to testify, occurring prior to *Griffin* v. *California,* 380 U.S. 609, was held not excused.

There was in the instant case, moreover, no decision of this Court overruling a line of authority relevant to confessed judgments between the time of hearings in the Common Pleas Court and petitioners' appeal to the Court of Appeals, in which a constitutional issue was first raised, or any other excuse to avoid the application of the trial court rule.

CONCLUSION

For the reasons stated the judgment below should be affirmed or the writ dismissed for lack of jurisdiction.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE.

(As in effect on July 12, 1968, the date of the judgment)

§ 2319.03 Use of affidavit. (GC § 11523)

An affidavit may be used to verify a pleading, to prove the service of the summons, notice, or other process in an action; or to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law.

§ 2323.13 Warrant of attorney to confess.

(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition.

§ 2325.07 Proceedings prior to vacation. (GC § 11637)

A judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action. When a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

§ 2325.08 Enforcement of judgment may be suspended. (GC § 11638)

The party seeking to vacate or modify a judgment or order may have an injunction suspending proceedings on the whole or a part thereof, to be granted by the court or a judge thereof, when it is rendered probable, by affidavit, or by exhibition of the record, that such party is entitled to a vacation or modification of such judgment or order.

D. H. OVERMYER CO., INC., OF OHIO ET AL. v. FRICK CO.

CERTIORARI TO THE COURT OF APPEALS OF OHIO, LUCAS COUNTY

No. 69-5. Argued November 9, 1971—Decided February 24, 1972

After a corporation (Overmyer) had defaulted in its payments for equipment manufactured and being installed by respondent company (Frick), and Overmyer under a post-contract arrangement had made a partial cash payment and issued an installment note for the balance, Frick completed the work, which Overmyer accepted as satisfactory. Thereafter Overmyer again asked for relief and, with counsel for both corporations participating in the negotiations, the first note was replaced with a second, which contained a "cognovit" provision in conformity with Ohio law at that time whereby Overmyer consented in advance, should it default in interest or principal payments, to Frick's obtaining a judgment without notice or hearing, and issued certain second mortgages in Frick's favor, Frick agreeing to release three mechanic's liens, to reduce the monthly payment amounts and interest rate, and to extend the time for final payment. When Overmyer, claiming a contract breach, stopped making payments on the new note, Frick, under the cognovit provision, through an attorney unknown to but on behalf of Overmyer, and without personal service on or prior notice to Overmyer, caused judgment to be entered on the note. Overmyer's motion to vacate the judgment was overruled after a post-judgment hearing, and the judgment court's decision was affirmed on appeal against Overmyer's contention that the cognovit procedure violated due process requirements. *Held:* Overmyer, for consideration and with full awareness of the legal consequences, waived its rights to prejudgment notice and hearing, and on the facts of this case, which involved contractual arrangements between two corporations acting with advice of counsel, the procedure under the cognovit clause (which is not unconstitutional *per se*) did not violate Overmyer's Fourteenth Amendment rights. Pp. 182–188.

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which all members joined, except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case. DOUGLAS, J.,

filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 188.

Russell Morton Brown argued the cause and filed a brief for petitioners.

Gregory M. Harvey argued the cause for respondent. With him on the brief was *James M. Tuschman*.

Franklin A. Martens filed a brief for the Ohio State Legal Services Assn. et al. as *amici curiae* urging reversal.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality, under the Due Process Clause of the Fourteenth Amendment, of the cognovit note authorized by Ohio Rev. Code § 2323.13.[1]

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[1] When the judgment challenged here was entered in 1968 the statute read:

"Sec. 2323.13. (A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

Senate Bill No. 85, 133 Ohio Laws 196–198 (1969–1970), effective Sept. 16, 1970, amended paragraphs (A) and (C), in ways not pertinent here, and added paragraph (D):

"(D) A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other

The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.[2] It was known at least as far back as Blackstone's time. 3 W. Blackstone, Commentaries *397.[3] In a case applying Ohio law, it was

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evidence of indebtedness executed on or after January 1, 1971, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the signature of each maker, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:

"'Warning—By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.'"

[2] The Iowa Supreme Court succinctly has defined a cognovit as "the written authority of the debtor and his direction . . . to enter judgment against him as stated therein." *Blott* v. *Blott*, 227 Iowa 1108, 1111–1112, 290 N. W. 74, 76 (1940).

In *Jones* v. *John Hancock Mutual Life Insurance Co.*, 289 F. Supp. 930, 935 (WD Mich. 1968), aff'd, 416 F. 2d 829 (CA6 1969), Judge Fox, in applying Ohio law, pertinently observed:

"A cognovit note is not an ordinary note. It is indeed an extraordinary note which authorizes an attorney to confess judgment against the person or persons signing it. It is written authority of a debtor and a direction by him for the entry of a judgment against him if the obligation set forth in the note is not paid when due. Such a judgment may be taken by any person or any company holding the note, and it cuts off every defense which the maker of the note may otherwise have. It likewise cuts off all rights of appeal from any judgment taken on it."

[3] Historical references appear in *General Contract Purchase Corp.* v. *Max Keil Real Estate Co.*, 35 Del. 531, 532–533, 170 A. 797, 798 (1933), and *First Nat. Bk.* v. *White*, 220 Mo. 717, 728–732, 120 S. W. 36, 39–40 (1909).

said that the purpose of the cognovit is "to permit the note holder to obtain judgment without a trial of possible defenses which the signers of the notes might assert." *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92, 96 (CA2 1952). And long ago the cognovit method was described by the Chief Justice of New Jersey as "the loosest way of binding a man's property that ever was devised in any civilized country." *Alderman* v. *Diament*, 7 N. J. L. 197, 198 (1824). Mr. Dickens noted it with obvious disfavor. Pickwick Papers, c. 47. The cognovit has been the subject of comment, much of it critical.[4]

Statutory treatment varies widely. Some States specifically authorize the cognovit.[5] Others disallow it.[6]

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[4] Recent Cases, Confession of Judgments—Refusal of New York State to Enforce Pennsylvania Cognovit Judgments, 74 Dick. L. Rev. 750 (1970); Note, Enforcement of Sister State's Cognovit Judgments, 16 Wayne L. Rev. 1181 (1970); H. Goodrich, Conflict of Laws § 73, p. 122 (4th ed. 1964); Hopson, Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit, 29 U. Chi. L. Rev. 111 (1961); Hunter, The Warrant of Attorney to Confess Judgment, 8 Ohio St. L. J. 1 (1941); Note, A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC, 35 U. Cin. L. Rev. 470 (1966); Comment, The Effect of Full Faith and Credit on Cognovit Judgments, 42 U. Colo. L. Rev. 173 (1970); Comment, Confessions of Judgment: The Due Process Defects, 43 Temp. L. Q. 279 (1970); Comment, Cognovit Judgments and the Full Faith and Credit Clause, 50 B. U. L. Rev. 330 (1970); Comment, Cognovit Judgments: Some Constitutional Considerations, 70 Col. L. Rev. 1118 (1970); Note, Confessions of Judgment, 102 U. Pa. L. Rev. 524 (1954); Note, Foreign Courts May Deny Full Faith and Credit to Cognovit Judgments and Must Do So When Entered Pursuant to an Unlimited Warrant of Attorney, 56 Va. L. Rev. 554 (1970); Note, Should a Cognovit Judgment Validly Entered in One State be Recognized by a Sister State?, 30 Md. L. Rev. 350 (1970).

[5] Ill. Rev. Stat., c. 110, § 50; Mo. Rev. Stat. § 511.100; Ohio Rev. Code § 2323.13; Pa. Stat. Ann., Tit. 12, §§ 738 and 739 and Pa. Rules of Civil Procedure 2950–2976; S. D. Comp. Laws § 21–26–1.

[6] See, for example, Ala. Code, Tit. 20, § 16, and Tit. 62, § 248;

Some go so far as to make its employment a misdemeanor.[7] The majority, however, regulate its use and many prohibit the device in small loans and consumer sales.[8]

In Ohio the cognovit has long been recognized by both statute and court decision. 1 Chase's Statutes, c. 243, § 34 (1810); *Osborn* v. *Hawley*, 19 Ohio 130 (1850); *Marsden* v. *Soper*, 11 Ohio St. 503 (1860); *Watson* v. *Paine*, 25 Ohio St. 340 (1874); *Clements* v. *Hull*, 35 Ohio St. 141 (1878). The State's courts, however, give the instrument a strict and limited construction. See *Peoples Banking Co.* v. *Brumfield Hay & Grain Co.*, 172 Ohio St. 545, 548, 179 N. E. 2d 53, 55 (1961).

This Court apparently has decided only two cases concerning cognovit notes, and both have come here in a full faith and credit context. *National Exchange Bank* v. *Wiley*, 195 U. S. 257 (1904); *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287 (1890). See *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932).

I

The argument that a provision of this kind is offensive to current notions of Fourteenth Amendment due process is, at first glance, an appealing one. However, here, as in nearly every case, facts are important. We state them chronologically:

1. Petitioners D. H. Overmyer Co., Inc., of Ohio, and D. H. Overmyer Co., Inc., of Kentucky, are segments of a warehousing enterprise that counsel at one point in

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Ariz. Rev. Stat. Ann. §§ 6–629 and 44–143; Mass. Gen. Laws Ann., c. 231, § 13A; N. J. Stat. Ann. § 2A:16–9.

[7] Ind. Ann. Stat. §§ 2–2904 and 2–2906; N. M. Stat. Ann. §§ 21–9–16 and 21–9–18; R. I. Gen. Laws Ann. §§ 19–25–24 and 19–25–36.

[8] See, for example, Conn. Gen. Stat. Rev. §§ 42–88 and 36–236; Mich. Comp. Laws §§ 600.2906 and 493.12, Mich. Stat. Ann. §§ 27A.2906 and 23.667 (12); Minn. Stat. §§ 548.22, 168.71, and 56.12.

the litigation described as having built "in three years . . . 180 warehouses in thirty states." The corporate structure is complex. Because the identity and individuality of the respective corporate entities are not relevant here, we refer to the enterprise in the aggregate as "Overmyer."

2. In 1966 a corporation, which then was or at a later date became an Overmyer affiliate, executed a contract with the respondent Frick Co. for the manufacture and installation by Frick, at a cost of $223,000, of an automatic refrigeration system in a warehouse under construction in Toledo, Ohio.

3. Overmyer fell behind in the progress payments due from it under the contract. By the end of September 1966 approximately $120,000 was overdue. Because of this delinquency, Frick stopped its work on October 10. Frick indicated to Overmyer, however, by letter on that date, its willingness to accept an offer from Overmyer to pay $35,000 in cash "provided the balance can be evidenced by interest-bearing judgment notes."

4. On November 3 Frick filed three mechanic's liens against the Toledo property for a total of $194,031, the amount of the contract price allegedly unpaid at that time.

5. The parties continued to negotiate. In January 1967 Frick, in accommodation, agreed to complete the work upon an immediate cash payment of 10% ($19,403.10) and payment of the balance of $174,627.90 in 12 equal monthly installments with 6½% interest per annum. On February 17 Overmyer made the 10% payment and executed an installment note calling for 12 monthly payments of $15,498.23 each beginning March 1, 1967. This note contained no confession-of-judgment provision. It recited that it did not operate as a waiver of the mechanic's liens, but it also stated that Frick would forgo enforcement of those lien rights so long as there was no default under the note.

6. Frick resumed its work, completed it, and sent Overmyer a notice of completion. On March 17 Overmyer's vice president acknowledged in writing that the system had been "completed in a satisfactory manner" and that it was "accepted as per the contract conditions."

7. Subsequently, Overmyer requested additional time to make the installment payments. It also asked that Frick release the mechanic's liens against the Toledo property. Negotiations between the parties at that time finally resulted in an agreement in June 1967 that (a) Overmyer would execute a new note for the then-outstanding balance of $130,997 and calling for payment of that amount in 21 equal monthly installments of $6,891.85 each, beginning June 1, 1967, and ending in February 1969, two years after Frick's completion of the work (as contrasted with the $15,498.23 monthly installments ending February 1968[9] specified by the first note); (b) the interest rate would be 6% rather than 6½%; (c) Frick would release the three mechanic's liens; (d) Overmyer would execute second mortgages, with Frick as mortgagee, on property in Tampa and Louisville; and (e) Overmyer's new note would contain a confession-of-judgment clause. The new note, signed in Ohio by the two petitioners here, was delivered to Frick some months later by letter dated October 2, 1967, accompanied by five checks for the June through October payments. This letter was from Overmyer's general counsel to Frick's counsel. The second mortgages were executed and recorded, and the mechanic's liens were released. The note contained the following judgment clause:

> "The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judg-

ment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for the period of fifteen (15) days."

8. On June 1, 1968, Overmyer ceased making the monthly payments under the new note and, asserting a breach by Frick of the original contract, proceeded to institute a diversity action against Frick in the United States District Court for the Southern District of New York. Overmyer sought damages in excess of $170,000 and a stay of all proceedings by Frick under the note. On July 5 Judge Frankel vacated an *ex parte* stay he had theretofore granted. On August 7 Judge Mansfield denied Overmyer's motion for reinstatement of the stay. He concluded, "Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary, extensive documentary evidence furnished by defendant indicates that the plaintiffs' action lacks merit."

9. On July 12, without prior notice to Overmyer, Frick caused judgment to be entered against Overmyer (specifically against the two petitioners here) in the Common Pleas Court of Lucas County, Ohio. The judgment amount was the balance then remaining on the note, namely, $62,370, plus interest from May 1, 1968, and costs. This judgment was effected through the appearance of an Ohio attorney on behalf of the defendants (petitioners here) in that Ohio action. His appearance was "by virtue of the warrant of attorney" in the second note. The lawyer waived the issuance and service of process and confessed the judgment. This attorney was not known to Overmyer, had not been retained by Overmyer, and had not communicated with the petitioners prior to the entry of the judgment.

10. As required by Ohio Rev. Code § 2323.13 (C), the clerk of the state court, on July 16, mailed notices of the entry of the judgment on the cognovit note to Overmyer at addresses in New York, Ohio, and Kentucky.

11. On July 22 Overmyer, by counsel, filed in the Ohio court motions to stay execution and for a new trial. The latter motion referred to "[i]rregularity in the proceedings of the prevailing party and of the court . . . ." On August 6, Overmyer filed a motion to vacate judgment and tendered an answer and counterclaim alleging breach of contract by Frick, and damages. A hearing was held. Both sides submitted affidavits. Those submitted by Overmyer asserted lack of notice before judgment and alleged a breach of contract by Frick. A copy of Judge Mansfield's findings, conclusions, and opinion was placed in the record. On November 16 the court overruled each motion.

12. Overmyer appealed to the Court of Appeals for Lucas County, Ohio, specifically asserting deprivation of due process violative of the Ohio and Federal Constitutions. That court affirmed with a brief journal entry.

13. The Supreme Court of Ohio "sua sponte dismisse[d] the appeal for the reason that no substantial constitutional question exists herein."

We granted certiorari. 401 U. S. 992 (1971).

II

This chronology clearly reveals that Overmyer's situation, of which it now complains, is one brought about largely by its own misfortune and failure or inability to pay. The initial agreement between Overmyer and Frick was a routine construction subcontract. Frick agreed to do the work and Overmyer agreed to pay a designated amount for that work by progress payments at specified times. This contract was not accompanied by any promissory note.

Overmyer then became delinquent in its payments. Frick naturally refrained from further work. This impasse was resolved by the February 1967 post-contract arrangement pursuant to which Overmyer made an immediate partial payment in cash and issued its installment note for the balance. Although Frick had suggested a confession-of-judgment clause, the note as executed and delivered contained no provision of that kind.

Frick completed its work and Overmyer accepted the work as satisfactory. Thereafter Overmyer again asked for relief. At this time counsel for each side participated in the negotiations. The first note was replaced by the second. The latter contained the confession-of-judgment provision Overmyer now finds so offensive. However, in exchange for that provision and for its execution of the second mortgages, Overmyer received benefit and consideration in the form of (a) Frick's release of the three mechanic's liens, (b) reduction in the amount of the monthly payment, (c) further time in which the total amount was to be paid, and (d) reduction of a half point in the interest rate.

Were we concerned here only with the validity of the June 1967 agreement under principles of contract law, that issue would be readily resolved. Obviously and undeniably, Overmyer's execution and delivery of the second note were for an adequate consideration and were the product of negotiations carried on by corporate parties with the advice of competent counsel.

More than mere contract law, however, is involved here.

III

Petitioner Overmyer first asserts that the Ohio judgment is invalid because there was no personal service upon it, no voluntary appearance by it in Ohio, and no genuine appearance by an attorney on its behalf. Thus,